In the Supreme Court of Pennsylvania, February, 1861.

WINTER ET AL. *vs.* DELAWARE MUTUAL SAFETY INSURANCE COMPANY.

1. A mere notice of abandonment, without actual abandonment, amounts to nothing.
2. If the facts do not justify an abandonment, it is not binding upon the underwriters or the assured.
3. If the ship be prevented by a peril within the policy from proceeding on her voyage, and be irreparably injured, and the voyage be thereby lost, it is a total loss of ship, freight, and cargo, provided no other ship can be procured to carry on the cargo.
4. The right to abandon does not always depend upon the amount of the sea damage to a cargo, but upon the facts of the case, and they are for a jury.
5. The propriety of a sale of a cargo, at a port of distress, is dependant upon the facts, and they are for a jury to determine.
6. If an abandonment is complete, the subsequent acts of the master cannot deprive the assured of the benefits resulting from it. He is thenceforth the agent of the underwriters, and bound to use diligence, skill, and care towards the interest of all concerned.
7. Whenever a cargo may, on account of the injuries from perils insured against, be abandoned as for a total loss, memorandum articles stand upon the same footing as others.
8. The provision in a policy for ascertaining a loss by a separation of the damaged from the undamaged articles applies only to cases of partial, not to a total loss constructive or absolute.

In this case the Delaware Mutual Safety Insurance Company insured for Winter, Latimer, & Co., of Baltimore, Maryland, in the sum of $2,500, on the schooner Orb, valued at $5,500, on a voyage from Baltimore to Portland, Oregon. And $5,000 on cargo valued at $17,000, per same vessel, for the same voyage.

It appears that the schooner Orb sailed from Baltimore, Maryland, on the 1st May, 1851, on her destined voyage to Oregon, and after having encountered tempestuous weather, and suffered considerable damage to her hull and spars, she put into Rio de Janeiro on the 9th of July, 1851. The cargo was uninjured.

To make the necessary repairs to the vessel, the captain borrowed money on bottomry of vessel and cargo from Maxwell, Wright & Co., of Rio. After the repairs were made, the said schooner sailed for San Francisco, California, under the bottomry bond, on the 1st of August, 1851, and having again encountered tempestuous weather

and suffered much damage to said vessel off Cape Horn, put back to Rio, where she again arrived on the 15th of October, 1851, and the said vessel and a portion of her cargo were sold at that port.

On hearing of the first disaster, plaintiffs, by letter of September 15th, 1851, abandoned the *vessel* to the underwriters. And, subsequently, by letter dated December 6th, 1851, on hearing the *second* disaster, they abandoned both *vessel* and *cargo* to the underwriters.

The cargo consisted of liquors, boots and shoes, Havana cigars, oysters, candles, starch, soap, china-ware, glass-ware, sugars, blankets, drillings, prints, osnaburgs, preserves, ginger, clocks, nails, pepper, rice, mustard, mace, nutmegs, cloves, blacking, ale and porter, hats, figs, snaffles, cotton goods, and musical instruments.

The voyage was broken up after the second return of the vessel, on the allegation that it would take more than she was worth to repair the vessel, that another vessel could not be procured, and that "*the cargo was generally so damaged as to be unfit for reshipment.*"

There was no survey held and return made of the damage to the particular portions of the cargo according to its several kinds, but the whole was surveyed as a mass, and returned generally to have been so damaged as to be unfit for reshipment.

The policy contained the following clauses:

First. "It is also agreed, that bar, bundle, rod, hoop, and sheet iron, wire of all kinds, tin plates, steel, madder, sumac, wickerware, and willow, manufactured or otherwise, cheese, salt, grain of all kinds, seeds of all kinds, *fruits, whether preserved or otherwise*, dry fish, vegetables and roots, prepared or otherwise, rags, hempen yarn, *bags*, cotton bagging, and other articles used for cotton bagging, pleasure carriages, *household furniture, musical instruments*, looking glasses, skins, and hides, and all articles perishable in their own nature, are warranted by the assured free from average, (except general,) unless it happen by stranding, and amount to twenty per cent. on the whole aggregate value of such articles."

Second. "And in case of *partial loss* by sea, damage to dry goods, cutlery, or other hardware, the loss shall be ascertained by a

separation of the damaged from the undamaged portion of the damaged package or packages respectively, and the sale of the damaged portion or portions only, and not otherwise; and the same practice shall obtain as to all other merchandise, so far as practicable."

There was uncontradicted evidence that storage could have been had for the cargo at Rio, and that advices in a reasonable time could have been received by the shippers and insurers in the United States. And most of the cargo was of such a character that it could have been reshipped thither.

Part of their cargo, to wit, the boots and shoes, were actually sent back to Baltimore in June, 1852, and a part of it was never accounted for.

The sale of the cargo at Rio was at a great sacrifice, having been valued in the policy at $17,000, and produced only $5,066 36.

The jury gave a verdict, in accordance with the plaintiffs' claim, for the full amount of the *partial* loss to the vessel arising from the first disaster, and for a subsequent *total loss* of the same, less the proceeds of sale.

They also gave a verdict for a *total loss of the entire cargo*, less the proceeds of sale.

The opinion of the Court was delivered by

THOMPSON, J.—This was an action to recover an insurance of the schooner Orb and cargo, on a policy for a voyage from Baltimore to Portland, Oregon, in May, 1851. In December, 1851, the vessel put into the port of Rio in distress and was, with the cargo, abandoned to the underwriters as for a total loss. The assignments of error upon instructions to the jury were numerous, and have been most elaborately and ably argued on both sides. The discussion has served to point attention to the material questions raised, and these alone we shall proceed to notice.

1. We think there was no error in the answer to the defendants' first point. A mere notice of abandonment without actual abandonment, amounted to nothing. Both parties acted as if no actual abandonment had taken place. If the facts did not justify it, the

assured would be no more bound by it than the underwriters. And that the latter are not, when the laws of commerce do not justify it, is a subject of too familiar practice to need argument to prove. No right could accrue to the insurers until actual abandonment. This, the plaintiffs say, did not take place anterior to their notice of the 15th of September, 1851, nor in consequence of the injury sustained upon which notice was predicated. And the defendants did not attempt to prove that it did—nor did they at any time do any act or thing showing an acceptance of abandonment, even if it had been justifiable; under the circumstances, they could not hold the other party bound if they choose to waive it. Here, however, it was not claimed that there was cause omitted for, and much less, actual abandonment.

2. The second, third, and fourth errors were considered together in the argument, and we will notice them in the same order.

It was objected, that the Court refused to charge that the fact did not justify an abandonment of the ship and cargo on December 6th, 1851. The objection made does not appear to be on account of the condition and circumstances of either, but because it was not shown that the marine test of sea damage to the extent of fifty per cent. existed. The defendants took no testimony on the point, and were forced to rely on the chances of deficiency in the plaintiffs' case. But in regard to this matter of fifty per cent. damage, it seems to us they were under some misapprehension. The rule is applicable to deterioration from what is called sea damage, that is to say, by wetting, leakage, and the like; and is so treated and spoken of by writers on the subject. 3 Kent, 329; *Siton* vs. *Delaware Insurance Co.*, 2 Wash. C. C. Rep. 175; 1 Arnold 199, note 1.

The same principle, in substance, prevails as to the vessel, but is differently stated; that is to say, when the cost of repair exceeds the one-half of its value, it may be treated as for a total loss.

In the case in hand, it appeared that the schooner Orb, having encountered severe gales and continued rough weather in the neighborhood of Cape Horn, was so much damaged as to be obliged to put back in distress to some port of safety. Under these circumstances, she arrived in the port of Rio in October, 1851. After a survey held, she was condemned as wholly unseaworthy, not worth

repairing, and recommended to be sold. That this was a case for abandonment for a total loss of the vessel is certain and is not disputed here.

It was also in proof, that the cargo, an assorted one, containing fruits, fish, oysters, and many other perishable articles, was much deteriorated, and on a survey, at the request of Maxwell, Wright & Co., was recommended to be sold. Furthermore, it appeared, that no shipment either in whole or in part of the cargo, could be had from the port of Rio to Portland, Oregon, the place of its destination. This the plaintiffs contended was a proper case for abandonment, not on the principle, however, of sea damage to the cargo, but upon a principle which they claim justified it without this element. Was it a case, therefore, for abandonment as for a total constructive loss? That it was, I think the authorities will abundantly show. I will proceed to cite a few of them.

In the celebrated case of *Rue* vs. *Salvador*, 3 Bing. N. C. 266, Lord Abinger said, "If in the progress of the voyage it (the cargo) becomes wholly destroyed and annihilated, or if it be placed, by reason of perils against which he insures, in such a position that it is wholly out of the power of the insured or underwriters to procure its arrival, he is bound by the letter of his contract to pay the sum insured."

So in Kent, vol. 3, 327, it is said that "if the ship be prevented by a peril within the policy from proceeding on her voyage, and be irreparably injured, and the voyage be thereby lost, it is a total loss of ship, freight, and cargo, provided no other ship can be procured to carry on the cargo." To the same effect is 1st Arnold, 990, 2d ib. 2008, and this is believed to be the current of authorities, without exception.

Under this state of facts, the plaintiffs say, they were induced to abandon the cargo as for a total loss. It is apparent, therefore, that the abandonment was dependent on the facts under this view of the law, and they were of course for the jury. The judge was right, therefore, in refusing to charge as requested; for it would have been error in law, as well as an invasion of the province of the jury, so to have done.

3. The next points relate to the acts of the master, in regard to the sale of the cargo, but we do not exactly see how the point arises in this case. The sale took place some considerable time subsequent to the abandonment, and as this operated as a cession or transfer of the cargo to the underwriters, if that were valid, it is not easy to see how a retrocession from any act of his in making a sale could take place. The acts of the master are usually scrutinized with a view to the question of salvage, and if contrary to good faith or the exercise of sound discretion, they may operate on the question of abandonment. Here, then, if the abandonment was complete, the subsequent acts of the master could not deprive the insured of the benefits resulting from it; he was thenceforth the agent of the underwriters, and bound to use diligence, skill, and care towards the interests of all concerned. But in whatever aspect we may view the point, to have instructed, as requested, would have been error. As we have already said, the justification of abandonment did not depend on sea-damage, strictly so called, but upon other facts and principles; the propriety of the sale, under the circumstances, was dependent on the facts, and these were for the jury, and properly so left to them. We see no error, therefore, in this part of the case.

4. The ninth assignment of error is upon the ruling of the Court below in regard to memorandum articles. The memorandum clause of insurance provides an exception from liability unless the damage amount to a certain specified sum, and stipulates that certain articles shall be free of general average, except in particular cases of injury, such as stranding. It exists in this policy, and under the clause the defendants claim to be exempt from liability, because the loss was not from stranding. It is well known that the practical use of the clause is to operate on certain goods more susceptible of sea-damage than others. Goods so susceptible are so well known, and the ordinary injuries from sea-damage so easily estimated, that insurers do not take the risk of all damage, and hence they usually fix a limit below which they will not be answerable. The usage is universal both in Europe and America, with but slight differences in form or substance. It is apparent, from this statement in regard

to the use and object of the memorandum clause, that its application is to partial and not total loss.

Kent states the rule to be that "if there be a total loss of the voyage by reason of shipwreck, or any other casualty, and there be no other means to forward the cargo, there is no distinction between the memorandum articles and the rest of the cargo. The total loss applies equally to the whole." 3 Kent, 267. For this many authorities are cited. So in the French code, article 409, the insurer is exempt under the clause "free from average for all partial losses, *except in cases which authorize an abandonment;* and in such cases the insured has the option between the abandonment and the claim for average losses."

In 2d Arnold, 1026, it is laid down, that it is not, however, to be concluded on this account, (the operation of the clause in question,) "that a total loss on articles free of average is a different thing from a total loss on other perishable goods not so insured; the contrary is the case." See authorities cited in note 1, same page.

"In all cases, in fact," says the same authority, "except those of partial loss, the goods comprised in the memorandum stand on the same footing as other goods. If the question turn on a totality of the loss, there is no difference between them and other perishable articles."

"Whether the loss be total or partial in its nature, must depend on general principles. The memorandum does not vary the rules by which, when a loss on such articles happens it is to be deemed partial or total. It does no more than preclude indemnity for an ascertained partial loss." *Poole* vs. *Protection Ins. Co.*, 14 Conn. 47.

In *Marian* vs. *United States Ins. Co.*, 3 Wash. C. C. Rep. 256, the doctrine is stated thus: "If the question turn on totality of loss, unconnected with the subject of loss by deterioration of the cargo in value, or reduction in quantity, there is no difference between memorandum and other articles. If the loss be total in fact, or is *such as the insured is permitted to treat as such*, he is entitled to abandon and to recover as for a total loss, in the case of memorandum articles; but always with this exception, that he is not permitted to turn a partial into a total loss."

The rule, therefore, deducable from these and many other authori-

ties is, that whenever the cargo may, on account of injuries from perils insured against, be abandoned as for a total loss, memorandum articles stand upon the same footing as others. There is much diversity on the subject of deterioration of the class of articles and the effect of a total change of their character, although they remain nominally in species the same, as incurring liability on part of the insurers. But, as the question does not properly arise here, we express no opinion on the subject. We do not think the assignment of error thus noticed is sustained, and accordingly we overrule it.

5. We do not see any practicable difficulty under the tenth error, because the loss of both vessel and cargo may be treated as total, if the evidence was believed, and they both belonged to the same party. The doctrine of contribution in payment of the bottomry bond does not arise in that form here, in which it might, and undoubtedly would, in cases of partial loss, or between separate owners.

6. Neither is the eleventh error sustained. It was truly said by the counsel for the defendants in error, that the provision in a policy for ascertaining a loss, by a separation of the damaged from undamaged articles, applied only to the cases of partial, not to a total loss, constructive or absolute; for so it expressly appears in the conditions attached to the policy. Discovering no error in any part of this record, the judgment is affirmed.

C. Ingersoll, Esq., for plaintiffs.
J. Hill Martin, Esq., and
Geo. M. Wharton, Esq., for defendants.

In the Supreme Court of Illinois, April Term, 1860.

HORACE NORTON ET AL. *vs.* JEREMY HIXON.

1. When the sheriff, who attaches a vessel and allows her to go into the hands of third parties, who use her and finally sell her, both the sheriff and such third parties will be treated as trustees for all the parties interested in the property, and in case the attaching creditor procures a judgment in the attachment suit, he may compel the sheriff and the parties having the earnings and proceeds of the vessel to account for the same and have them applied to the payment of his judgment.